

## CONSTITUTIONAL PROTECTION OF LIBERTY OF CONTRACT: DOES IT STILL EXIST?

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In 1628, when the English Parliament was engaged in its contest with Charles I, one of its members said in the course of the debate:

"I shall be very glad to see that good, old, decrepid law of Magna Charta, which hath been so long kept in and lain bedrid as it were; I should be glad, I say, to see it walk abroad again." <sup>1</sup>

Old Magna Charta referred to by Sir Edward Coke as "such a fellow that he will have no sovereign" <sup>2</sup> was made to "walk abroad again" in 1776 by the American statesmen who were responsible for the founding of our institutions. They were almost without exception of English birth or descent. They were influenced in their thinking by European political and philosophical writers such as Montesquieu and Voltaire, but the groundwork of their political consciousness was their intimate knowledge of the history, institutions and common law of England. Contemporary history leaves no doubt that the principal end they had in view was to protect individual rights against arbitrary power, whether exercised by King and Parliament or by any government which might be set up by the people themselves.

The earliest constitution of Pennsylvania (which is typical of the other state constitutions), adopted on September 28, 1776, contains a declaration of the inherent and inalienable rights "of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety", and provides that no man can "be justly deprived of his liberty, except by the laws of the land or the judgment of his peers."

The members of the Convention which framed the Constitution of the United States in 1787 believed that they had sufficiently protected the rights of the individual by a careful separation of the powers of government into three departments, each of which would be a check upon the other. Public opinion, however, disagreed with this conclusion and ultimately the members of the Convention were won over to the view that a bill of rights was advisable; hence we have the first ten amendments to the Constitution, adopted shortly after it was ratified, which in the language of the Fifth Amendment protect the individual against the power of Congress to deprive him "of life, liberty or property without due process of law".

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1. 2 PARLIAMENTARY HISTORY ( ) col. 335.

2. *Id.* col. 357.

Until the adoption of the Fourteenth Amendment, after the Civil War, the primary rights of individuals were protected against the action of Congress by these ten amendments and especially by the Fifth, as related to the subject of this paper, and from the power of the states by bills of rights contained in the state constitutions. While the proper construction of the Fourteenth Amendment was considered somewhat in doubt for a few years,<sup>3</sup> it was not long before it became well established that its effect was to restrain the power of the states, no matter by what organs or in what manner they attempted to exercise that power.<sup>4</sup>

The theory of our constitutional law is that there are individual rights which are beyond the power of government to abridge. This is well expressed in *Loan Association v. Topeka*, decided in 1874, in which the Supreme Court said it must be conceded that there are

"rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism . . .

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere." <sup>5</sup>

One of the primary rights which was believed to be protected from the power of government is that which has come to be known as "liberty of contract". The principle that "liberty" includes the right of a man to engage in any lawful occupation which he may choose, and to contract freely concerning the same, was not made the basis of the decision of any court until comparatively recently, but nothing is to be found in any of the earlier cases inconsistent with it.

Judge Cooley in his *Constitutional Limitations* points out that "in the early days of the common law it was sometimes thought necessary, in order to prevent extortion, to interfere, by royal proclamation or otherwise, and establish the charges which might be exacted for certain commodities or services", and that this practice, including the regulation of wages, prevailed to some extent in this country up to the time of the Revolution; but "since then it has been commonly supposed that a general power in the State to regulate prices was inconsistent with constitutional liberty".<sup>6</sup>

3. See 3 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929) 1690-94; Corwin, *The Doctrine of Due Process of Law Before the Civil War* (1911) 24 HARV. L. REV. 366, 460; *The Supreme Court and the Fourteenth Amendment* (1909) 7 MICH. L. REV. 643; Howard, *The Supreme Court and State Action Challenged Under the Fourteenth Amendment, 1930-1931* (1932) 80 U. OF PA. L. REV. 483.

4. *Davidson v. New Orleans*, 96 U. S. 97 (1877).

5. 20 Wall. 655, 662-663 (U. S. 1874).

6. COOLEY, *CONSTITUTIONAL LIMITATIONS* (7th ed. 1903) 870.

In the *Slaughter House Cases*,<sup>7</sup> decided in 1872, Justices Field and Bradley, dissenting, maintained that laws interfering with the freedom of the individual to adopt and follow any occupation he might choose were a violation of the liberty secured to the individual by the Constitution.

The law in question, regulating the business of slaughtering cattle in the City of New Orleans, was sustained by the majority of the Court as a police regulation necessary and appropriate for the protection of the health of the people of that city, but while the Court was at that time disinclined to assert its power over the states under the Fourteenth Amendment, there was no dissent from the views expressed by the minority on the meaning of "liberty".

A law which it was alleged interfered with liberty of contract, was again under consideration in *Munn v. Illinois*,<sup>8</sup> decided in 1876. The law in question undertook to regulate grain warehouses, requiring them to be licensed and fixing maximum rates for storage. The law was sustained by the majority of the Court on the theory that the business of operating grain warehouses was of a public character, that the property engaged in that business was, in the words of the Chief Justice, "devoted to a public use", and that where a business is affected with a public interest, the state may regulate it even to the extent of requiring licenses and fixing the prices to be charged without violating the Constitution. The majority opinion clearly recognized that except for the peculiar nature of the business, the act would have been invalid as an infringement of liberty of contract.<sup>9</sup>

Mr. Justice Field disagreed with the conclusion that the warehouses had been devoted to a public use and stated the question at issue as follows:

"The question presented, therefore, is one of the greatest importance,—whether it is within the competency of a State to fix the compensation which an individual may receive for the use of his own property in his private business, and for his services in connection with it."<sup>10</sup>

"If the legislature of a State, under pretence of providing for the public good, or for any other reason, can determine, against the consent of the owner, the uses to which private property shall be devoted, or the prices which the owner shall receive for its uses, it can deprive

7. 16 Wall. 36 (U. S. 1872).

8. 94 U. S. 113 (1876).

9. "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only'. . . . But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle." (*Id.* 125-126, 130.)

10. *Id.* at 138.

him of the property as completely as by a special act for its confiscation or destruction."<sup>11</sup>

In *Butchers' Union Co. v. Crescent City Co.*,<sup>12</sup> decided in 1884, Mr. Justice Field in his concurring opinion again referred to the inherent and inalienable rights of the individual to pursue his own happiness, by which, he said, is meant "the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others". This opinion has been referred to as the fountain-head of the doctrine of liberty of contract, although it would perhaps be more accurate to say that it merely called attention to a principle never denied, and which seems to be necessarily implied from the language used in the early state constitutions and in the Fifth Amendment to the Constitution of the United States.

Roscoe Pound, writing in 1909,<sup>13</sup> gives to the Supreme Court of Pennsylvania the (in his mind doubtful) credit, for the first decision turning upon this point, *Godcharles v. Wigeman*,<sup>14</sup> decided in 1886. In that case it appeared that a Pennsylvania statute prohibited the payment of wages in store orders, providing that such an order if given should not be a set-off to a claim for wages. The Supreme Court of Pennsylvania in a very brief opinion by Mr. Justice Gordon held certain sections of the act unconstitutional and void "inasmuch as by them an attempt has been made by the legislature to do what in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts".<sup>15</sup>

The next year, 1887, the Supreme Court of the United States, in affirming a case which went up from the Supreme Court of Pennsylvania,<sup>16</sup> assented to the proposition advanced by defendant

"that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property as guaranteed by the Fourteenth Amendment",<sup>17</sup>

although the decision upheld the challenged statute as a police regulation.

The first decision of the Supreme Court of the United States striking down a law as a violation of liberty of contract was *Allgeyer v. Louisiana*, decided in 1897. The Court in its opinion said that the "liberty" mentioned in the Fourteenth Amendment means

"the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he

11. *Id.* at 142.

12. 111 U. S. 746, 757 (1884).

13. Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454, 455.

14. 113 Pa. 431, 6 Atl. 354 (1886).

15. *Id.* at 437, 6 Atl. 356.

16. *Powell v. Pennsylvania*, 127 U. S. 678 (1887).

17. *Id.* at 684.

will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.”<sup>18</sup>

These cases were followed by a number of others in various states, which need not be mentioned here, and in 1904 by the case of *Lochner v. New York*, which definitely settled the principle that:

“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”<sup>19</sup>

The law stricken down in that case was one forbidding employees in bakeries to work, or the employer to permit them to work, more than ten hours a day. This law, a majority of the Court held, was in violation of the freedom of contract and unconstitutional. A minority of the Court thought the law was sustainable as a police regulation.

*Adkins v. Children's Hospital*,<sup>20</sup> made a similar ruling as to the power of Congress under the Fifth Amendment. A law applying to the District of Columbia which undertook through a commission to fix minimum wages for women and children was held void. The Court said:

“That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause (Fifth Amendment), is settled by the decisions of this Court and is no longer open to question.”<sup>21</sup>

There are many other cases in the Supreme Court of the United States dealing with this question. It is impossible even to mention all of them here. It is sufficient for the purposes of this article to point out that three classes of contracts were marked out which the legislatures could regulate without coming into conflict with the Fourteenth Amendment.

The first and larger class consisted of those contracts which were of such a nature that their regulation, control, and in some cases prohibition, was necessary or advisable for the protection of the health, safety, morals or good order of the public. As the Court expressed it in *Lochner v. New York*,

“If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment”;<sup>22</sup>

continuing, however, with this limitation, that

18. 165 U. S. 578, 589 (1897).

19. 198 U. S. 45, 53 (1905).

20. 261 U. S. 525 (1923).

21. *Id.* at 545.

22. 198 U. S. 45, 53 (1905).

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be."<sup>23</sup>

While the police power cannot in the nature of things be very clearly defined<sup>24</sup> the courts have hitherto found it entirely possible to determine whether a law passed by a legislature was a *bona fide* exercise of its power to protect the public in the matters above indicated. Many laws of this character have been sustained, although they interfered with the making or enforcing of contracts.<sup>25</sup>

23. *Id.* at 56.

24. The term "police power" has been given two distinct connotations by the Supreme Court. As is pointed out by Professor Willoughby [3 WILLOUGHBY, *THE CONSTITUTION OF THE UNITED STATES* (2d ed. 1929) 1766] the first occasion for the use of the phrase arose in the early cases wherein the Court was laboring to define the division of legislative power between the federal government and the states; the term was then used to connote the reserved power of the states. HASTINGS, *THE DEVELOPMENT OF LAW AS ILLUSTRATED BY THE DECISIONS RELATING TO THE POLICE POWER OF THE STATE* (1900) 360. It was in such a case that Chief Justice Taney referred to the police power of the states as "the power of sovereignty, the power to govern men within the limits of its dominion": *License Cases*, 5 How. 504, 583 (U. S. 1847). The second and entirely different use of the term arose in the due process cases. In this connection, the police power does not mean the general power to legislate; it means the paramount power of the state to override individual rights in the interest of the community as a whole. As well put by Willoughby, "Though thus growing out of the contest between Federal and State authority, the phrase 'police power', when it had come to have the special meaning just referred to, began to find application as designating a field of legislative authority to regulate private rights of persons and property free from the constitutional objection that due process of law was thereby denied." 3 WILLOUGHBY, *supra* at 1767 (italics supplied). The necessity for so restricting the meaning of police power in due process cases was forcibly stated by Justice Peckham in *Lochner v. New York*, 198 U. S. 45, at 56: "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise . . . the claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint." This language was repeated by the Court in *Adkins v. Children's Hospital*, 261 U. S. 525, at 548-549 (1923).

It is, of course, in its second and restricted connotation that the term is employed in this article.

25. Among such laws may be mentioned sanitary regulations, *Hutchinson v. City of Val-dosta*, 227 U. S. 303 (1912); laws restricting offensive trades, industries and structures, *Fischer v. St. Louis*, 194 U. S. 361 (1904); *Welch v. Swasey*, 214 U. S. 91 (1909); *Hada-check v. Sebastian*, 239 U. S. 394 (1915); *Reinman v. Little Rock*, 237 U. S. 171 (1915); laws to prevent unfair trade practices, *Central Lumber Co. v. South Dakota*, 226 U. S. 157 (1912); *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342 (1915); *Van Camp & Sons v. American Can Co.*, 278 U. S. 245 (1928); regulations as to the manner in which wages shall be paid so as to prevent fraud, *Knoxville Iron Co. v. Harbison*, 183 U. S. 13 (1901); *Patterson v. Bark Eudora*, 190 U. S. 169 (1903); *Erie R. R. v. Williams*, 233 U. S. 685 (1914); requiring the licensing of certain businesses and professions in which unqualified persons might do damage to the public, *Hayman v. Galveston*, 273 U. S. 414 (1927); *Graves v. Minnesota*, 272 U. S. 425 (1926); *Bratton v. Chandler*, 260 U. S. 110 (1922); and (cases which it was subsequently held went to the verge of the law) regulations governing the renting of houses during an emergency threatening the public safety, *Block v. Hirsh*, 256 U. S. 135 (1920); *Marcus Brown v. Feldman*, 256 U. S. 170 (1920); *Levy Leasing Co. v. Siegal*, 258 U. S. 242 (1921).

The second class of cases in which the Supreme Court has held that the state legislatures are free to regulate contracts are those in connection with businesses affected with a public interest. The first important case dealing with this subject is *Munn v. Illinois*,<sup>26</sup> already mentioned, in which the Court was at much pains to point out that the business of operating a grain elevator, under consideration at the time, was one affected with a public interest and, therefore, subject to regulations which could not ordinarily be ascribed to the police power, such as, for example, fixing maximum or minimum prices to be charged. The opinion of the Court clearly recognized that had the business not been of this character such regulations would have been invalid.

In *Wolff Packing Co. v. Court of Industrial Relations of the State of Kansas*,<sup>27</sup> there was a very careful discussion of the kinds of businesses which are charged with a public interest so as to admit of public regulation. The Court found these included railroads, other common carriers, public utilities, inn keepers, operators of grain elevators, and other like businesses, but, said the Court:

"the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified.

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation."<sup>28</sup>

The latest case dealing with this subject, prior to the recent decision of *Nebbia v. New York*, was *New State Ice Co. v. Liebman*,<sup>29</sup> decided in 1932. The State of Oklahoma by legislation had declared that the business of manufacturing artificial ice was charged with a public interest and undertook to require persons engaging therein to be licensed. In striking down the law, the Supreme Court pointed out that the ice business was

"as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor",<sup>30</sup>

and continued:

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Whether a state may constitutionally regulate contracts between employers and their employees by forbidding the employer to make a condition to employment that the employee should not be or become a member of a labor union, is another question which has been recognized as being on the border line. While some courts have sustained such legislation as a police regulation on the ground that employers and employees do not deal with each other upon equal terms, such a doctrine has never been sustained by the Supreme Court; see *Adair v. United States*, 208 U. S. 161 (1907); *Coppage v. Kansas*, 236 U. S. 1 (1914).

26. 94 U. S. 113 (1877).

27. 262 U. S. 533 (1922).

28. *Id.* at 536, 537.

29. 285 U. S. 262 (1932).

30. *Id.* at 277.

"It is beyond the power of a state, under the guise of protecting the public, arbitrarily to interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." <sup>31</sup>

The third class of cases in which regulation was held to be justified, involves contracts relating to the performance of public work, which need not detain us.<sup>32</sup>

The cases above discussed are not isolated cases; they close a long list in which the Supreme Court has sustained the same doctrine, and perhaps there has been no plainer statement of it than that contained in *New State Ice Co. v. Liebman*.<sup>33</sup> The majority of the Court in that case consisted of the Chief Justice and Justices Van Devanter, McReynolds, Sutherland, Butler and Roberts. There was a dissent by Mr. Justice Brandeis, concurred in by Mr. Justice Stone. Mr. Justice Cardozo took no part in the decision.

On March 5, 1934, less than two years thereafter, the Court announced its decision in the case of *Nebbia v. New York*,<sup>34</sup> in an opinion delivered by Mr. Justice Roberts and concurred in by the Chief Justice and Justices Brandeis, Stone and Cardozo. Justices Van Devanter, McReynolds, Sutherland and Butler dissented. Although not discussing the cases previously referred to, the decision was in effect a reversal of the doctrine announced in those cases in a very important particular.

The question involved in the case was the validity of a statute of New York and an order made pursuant thereto by a board set up under the authority of the statute. The act had established a "Milk Control Board", with power to fix, among other things, minimum and maximum retail prices to be charged for milk. The board fixed nine cents a quart as the price to be charged in sales by stores. *Nebbia*, the proprietor of a grocery store, had sold two quarts of milk for eighteen cents but had "thrown in" a five-cent loaf of bread. He was arrested, tried and convicted for violating the order of the board and consequently the statute. His conviction was sustained by the Supreme Court.

It will be observed that the business here sought to be regulated by the statute was one which had been expressly stated by the Court in *New State Ice Co. v. Liebman*,<sup>35</sup> and in other cases, to be an ordinary business, not subject to such regulation. How, then, did the Court arrive at its conclusion that the statute should be sustained? It would seem clear from the foregoing considerations that the law could not be sustained without de-

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31. *Id.* at 278.

32. *Atkin v. Kansas*, 191 U. S. 207 (1903); *Heim v. McCall*, 239 U. S. 175 (1915); *Ellis v. United States*, 206 U. S. 246 (1906).

33. 285 U. S. 262 (1931).

34. 291 U. S. 502 (1934).

35. 285 U. S. 262 (1931).



parting from previously announced principles, unless it were held to be a police regulation reasonably necessary to protect the health and safety of the people of New York, or unless the milk business (contrary to the statement of the Court in *New State Ice Company v. Liebman*) were held to be a business affected with a public interest as previously understood and thus subject to regulation and control in other respects. But the court did neither.

The opinion refers to the fact that the milk industry in the State of New York had been subject to regulation in the public interest, and that a legislative report disclosed what is referred to as "destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price cutting and reduced the income of the farmer below the cost of production", but the Court nowhere says that this law is sustained as a police regulation, necessary to protect the public safety against consequences which might arise from the conditions thus described.<sup>36</sup>

Neither does the opinion of the Court say that the milk business is one affected with a public interest in the sense in which those words have been used in previous decisions of the Court. It impliedly denies this. The Court, however, continues:

"But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle."<sup>37</sup>

The Court's remark that it must be conceded that the milk industry is subject to regulation in the public interest obviously refers to police regulations of the character previously mentioned.<sup>38</sup> But in view of the previous decisions of the Court, the mind does not pass so easily from this proposition to the following one that nothing bars the state from "correcting existing maladjustments [of the milk business] by regulation touching prices".

This conclusion is inconsistent with statements contained in the opinion of the Court in *New State Ice Co. v. Liebman* that the dairy business is not one of those affected with a public interest, and is out of harmony

36. The Court in the course of its opinion (pp. 523-525) quotes the language of Chief Justice Taney in the License Cases, 5 How. 504 (U. S. 1847), and of Mr. Justice Barbour, in *New York v. Miln*, 11 Pet. 102, 139 (U. S. 1837), to the effect that the police power of the states is synonymous with their residuary power to legislate, but the inapplicability of this use of the term "police power" when invoked to justify legislation challenged under the due process clause has been sufficiently discussed (*supra* note 24). There was no ruling that the law in question was to be classed as a police regulation in its restricted sense.

37. 291 U. S. 531-532 (1934).

38. *Supra* note 25. The Court points out that the industry had been previously regulated by laws requiring quarantine of cattle, prescribing rules for the care and feeding of cattle and the protection of milk against contamination, and by prohibitions of unfair trade practices (p. 522).

with the previous opinions of the Court holding that price regulation is not permissible unless the business is of that character.

In order to reach its conclusion it became necessary for the Court either to adopt a much wider definition of the phrase "affected with a public interest", or to declare that the distinction hitherto drawn between businesses affected with a public interest and ordinary businesses was unsound and no longer to be regarded. The Court chose the latter alternative.

It discussed *Munn v. Illinois*, and concluded that the words "affected with a public interest", as used in that case, were "the equivalent of 'subject to the exercise of the police power' ". It must be conceded that this has not hitherto been the accepted interpretation of *Munn v. Illinois*. All businesses are, of course, subject to the police power and wherever the public safety demands regulation private interests must give way. But it has hitherto been supposed that the true meaning of the decision in *Munn v. Illinois* was that regulations not sustainable under the police power (such as price-fixing) could be made by a state legislature only if the business was one which bore a special relation to the public. If this were not so there would have been no point in the careful distinction between businesses affected with a public interest and ordinary businesses.<sup>39</sup>

The Court's interpretation of *Munn v. Illinois*, however, in effect destroys the distinction, so far as legislative power is concerned, between businesses affected with a public interest and other businesses. The opinion continues:

"The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good . . . there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."<sup>40</sup>

This is indeed cutting the Gordian knot. We should conclude, even without further assurance from the Court, that the legislature would be the final judge of what is "adequate reason" for regulating an industry

39. Mr. Justice McReynolds, dissenting, mentioned the fact that *Munn v. Illinois* had been "much discussed" in the cases above cited, and continued (p. 555):

"Always the conclusion was that nothing there sustains the notion that the ordinary business of dealing in commodities is charged with a public interest and subject to legislative control. The contrary has been distinctly announced. To undertake now to attribute a repudiated implication to that opinion is to affirm that it means what this Court has declared again and again was not intended. The painstaking effort there to point out that certain businesses like ferries, mills, &c. were subject to legislative control at common law and then to show that warehousing at Chicago occupied like relation to the public would have been pointless if 'affected with a public interest' only means that the public has serious concern about the perpetuity and success of the undertaking. That is true of almost all ordinary business affairs. Nothing in the opinion lends support, directly or otherwise, to the notion that in times of peace a legislature may fix the price of ordinary commodities—grain, meat, milk, cotton, &c."

40. 291 U. S. 502, 536-537 (1933).

"for the public good"; but we are left in no doubt about this, as the Court continues :

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it." <sup>41</sup>

The Court did not expressly overrule the cases previously discussed, but passed them over with the statement that they must rest

"finally upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect." <sup>42</sup>

If we search through the opinion to find whether any limit to the legislative power is declared to exist, we find it only in this sentence near the end—

"Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." <sup>43</sup>

It might be possible perhaps for a lawyer to advise his client whether or not a regulation is discriminatory in character, but if he endeavors to form an opinion whether or not it will be held to be "arbitrary" or "irrelevant" to the policy which the legislature has adopted, or whether there was "adequate reason" for subjecting the industry to control, he will find himself like one wandering in the wilderness without compass or other means of guidance.

In the dissenting opinion of Mr. Justice McReynolds it is said :

"And if it be now ruled that one dedicates his property to public use whenever he embarks on an enterprise which the Legislature may think it desirable to bring under control, this is but to declare that rights guaranteed by the Constitution exist only so long as supposed public interest does not require their extinction. To adopt such a view, of course, would put an end to liberty under the Constitution." <sup>44</sup>

and again :

"The Legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if for the moment, this may seem advantageous to the public. And the adoption

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41. *Ibid.*

42. *Ibid.*

43. *Id.* at 539.

44. *Id.* at 555.

of any 'concept of jurisprudence' which permits facile disregard of the Constitution as long interpreted and respected will inevitably lead to its destruction. Then, all rights will be subject to the caprices of the hour; government by stable laws will pass." <sup>45</sup>

In order to understand the consequences which flow from this decision we should give some attention to the philosophy of those members of the Court whose views, so long expressed in dissenting opinions, have now apparently prevailed with a majority of the Court.

The first notable dissent from the holding of the Court that the Fourteenth Amendment prevents the states from regulating ordinary businesses in matters not considered subject to police regulations was by Mr. Justice Holmes in *Lochner v. New York*. We read his views as follows:

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." <sup>46</sup>

And again:

"I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." <sup>47</sup>

In *Adair v. United States*, Justice Holmes dissenting, again we read that:

"Where there is, or generally is believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this court agrees or disagrees with the policy pursued." <sup>48</sup>

In *Coppage v. Kansas*,<sup>49</sup> he said, referring to the belief of a workman that he could not secure a fair contract unless he belonged to a labor union, if that belief "whether right or wrong may be held by a reasonable man" it may be enforced by law and is not a violation of liberty of contract.

In *Adkins v. Children's Hospital*,<sup>50</sup> he expressed his opinion that if a man might reasonably believe that legislation assailed is beneficial to the

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45. *Id.* at 558-559.

46. 198 U. S. 45, 75 (1905).

47. *Id.* at 76.

48. 208 U. S. 161, 191 (1907).

49. 236 U. S. 1, 27 (1913).

50. 261 U. S. 525, 570-571 (1923).

country, the Court has no right to interfere on the ground that it is a violation of the freedom of contract.

In *Tyson v. Banton*,<sup>51</sup> he again said the legislature "may forbid or restrict any business when it has a sufficient force of public opinion behind it", but with the rather cryptic limitation "subject to compensation when compensation is due", the meaning of which is not altogether clear.

Running all through Mr. Justice Holmes' dissenting opinions is the thought that the decisions which he was criticizing were based not upon legal but upon economic considerations, and that the Court was not warranted in setting up its judgment in such matters against that of the legislature. The only limitation to the legislative power which he suggested was that the economic theory enforced by the statute should be such as could be held by a reasonable man; if it was, he concluded—no infringement of "liberty" could be justly charged.

While it is true that Mr. Justice Holmes retired from the Court before the decision in *Nebbia v. New York*, it cannot be doubted that his views have had their effect upon the minds of his former associates.

Mr. Justice Brandeis, who joined Mr. Justice Holmes in his dissents on these and similar constitutional questions, reaches his conclusion in a slightly different manner. In his dissenting opinion in *New State Ice Co. v. Liebman*, he takes the position that it is for the legislature to determine whether or not any business should be declared a public business and, therefore, subject to regulation. While this declaration is subject to judicial review, the conclusion of the legislature must be sustained if it could reasonably be decided that the business is public in its character.<sup>52</sup>

Mr. Justice Stone, who also dissented in previous cases dealing with this subject, approaches the matter in a similar way. In *Tyson v. Banton*, he says the solution of the question at issue turns

"upon considerations of economics about which there may be reasonable differences of opinion,"<sup>53</sup>

and concludes that the judgment of the legislature rather than that of the Court should prevail. The reasoning of these three Justices leads substantially to the same conclusion, *i. e.*, that if the legislature of a state, sustained as it presumably is by the public opinion of its citizens, reaches the conclusion that a business should be regulated, or, as Mr. Justice Brandeis

51. 273 U. S. 418, 446 (1926).

52. *Id.* at 286. "The function of the Court is primarily to determine whether the conditions in Oklahoma are such that the legislature could not reasonably conclude (1) that the public welfare required treating the manufacture of ice for sale and distribution as a 'public business'; and (2) that in order to ensure to the inhabitants of some communities an adequate supply of ice at reasonable rates it was necessary to give the Commission power to exclude the establishment of an additional ice plant in places where the community was already well served."

53. 273 U. S. 418, 454 (1926).

puts it, that it is a public business and subject to regulation, the Court is bound by this conclusion if it could be reached by reasonable men.

The opinion of the Court in *Nebbia v. New York*, while not expressly accepting the doctrine of the formerly dissenting Justices, arrives at the same result by re-examining *Munn v. Illinois* and concluding that the principles supposed to have been laid down therein, which said dissenting Justices had been at such pains to explain or reconcile, never had any real existence. Its conclusion is that legislation not held to be arbitrary or discriminatory in its nature, will be sustained although it regulates, controls or prohibits business of any kind, if this is done pursuant to some economic theory which the state legislature has adopted; if the state may do this under the Fourteenth Amendment, Congress may do it under the Fifth.

Thus, it would seem clear that Congress or the state legislatures (so far as the due process clauses are concerned), may fix maximum prices for the sale of commodities of all kinds, as was done by prerogative of the King or by Parliament in the early days of the common law. If they may fix maximum prices, they may also fix minimum prices. They may provide that the employees of industry must belong to unions or they may forbid them to belong to unions. They may fix the rates of wages and the hours of labor. They may limit the output of the manufacturer or farmer and determine the kind and character of product he shall make or grow. They may forbid the carrying on of businesses which Congress or the legislature at the time deems to be inconsistent with some economic or other theory, which has been adopted by the Congress or the legislature in question.

It would seem that old Magna Charta has again taken to his bed.

The restriction laid down by the Court that such laws must not be arbitrary or discriminatory is at best illusory and vague. If it be true that the passage of a law by a legislative body is a sufficient indication that it is not a violation of liberty, as suggested by Justices Holmes and Brandeis, it may be accepted by the Court as a sufficient indication that it is neither arbitrary nor discriminatory.

The theory upon which our constitutional system is based is that there are certain fundamental principles which can be stated in understandable language and embodied in a constitution, and appealed to for the protection of individual rights against legislative or executive power; as expressed in *Loan Association v. Topeka*, that there are "rights in every free government beyond the control of the state".<sup>54</sup>

A theory of government, however, has been recently forging its way to the front, that Congress and legislatures should not be restrained by the Constitution from passing legislation which at the time is believed by a majority of those bodies to be beneficial to the public. The idea has of late

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54. 20 Wall. 655, 662 (U. S. 1874).

been growing stronger that popular wishes expressed in legislative acts should not be overturned by judges.

While in view of the trend of current constitutional discussion one might almost feel apologetic in basing an argument upon the views of the founders of the Constitution, it may not offend the sensibilities of my readers if I point out that the breaking down of the constitutional protection thrown about individual rights, by waves of popular feeling, was exactly the thing which the framers of the Constitution intended to prevent. They recognized that these rights could only be maintained in the face of the insidious but powerful effect of public opinion by great firmness and courage on the part of the judges. Said Hamilton in *The Federalist*:

"But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had been instigated by the major voice of the community."<sup>55</sup>

To lower constitutional bars because popular majorities desire it, would be to abandon the principles upon which the American government was founded, and yet, evidence is not wanting that some distinguished authorities have entertained the belief that judges in passing upon the constitutionality of statutes should consider the needs and wishes of the times. Thus, the late Professor Thayer of Harvard suggests this view. He gives it as his opinion that the function of the Court in passing upon the constitutionality of statutes is at least partially political in character and concludes:

"If that be so, then the judges must apply methods and principles that befit their task."<sup>56</sup>

One distinguished commentator, Professor Edward S. Corwin, of Princeton, says that the fear of popular majorities "lies at the very basis of the whole system of judicial review and indeed of our entire constitutional system".<sup>57</sup>

Another eminent commentator, James Bryce, has even suggested that such influences affect the Supreme Court of the United States. He said:

"The Supreme court feels the touch of public opinion. Opinion is stronger in America than anywhere else in the world, and judges are only men. To yield a little may be prudent, for the tree that cannot bend to the blast may be broken. . . . Of course, whenever the law is clear, because the words of the Constitution are plain or the cases interpreting them decisive on the point raised, the court must look solely to those words and cases, and cannot permit any other consideration to affect its mind. But when the terms of the Constitution

55. P. 389.

56. THAYER, *LEGAL ESSAYS* (1908) 32.

57. Corwin, *supra* note 3, at 670.

admit of more than one construction, and when previous decisions have left the true construction so far open that the point in question may be deemed new, is a court to be blamed if it prefers the construction which the bulk of the people deem suited to the needs of the time? A court is sometimes so swayed consciously, more often unconsciously, because the pervasive sympathy of numbers is irresistible even by elderly lawyers.”<sup>58</sup>

If the Justices of the Supreme Court have ever allowed their judgment to be influenced by such considerations, they have given no hint of it in their opinions. The Justices who dissented in the earlier cases relating to liberty of contract put their dissent not on the ground that laws should be sustained because popular majorities desired them, but on the narrower ground that where a law was passed in response to a popular demand it could not be considered a violation of that liberty which was guaranteed by the Fifth or Fourteenth Amendments. Even this point of view is not expressly approved by the opinion of the Court in *Nebbia v. New York*, but we nevertheless have a distinct sense of movement from the ancient moorings.

If the views of the formerly dissenting Justices that the approval by the legislature of a regulation of business is a sufficient indication that it is not a violation of liberty of contract, become the views of the majority of the Court, such approval may be considered as a sufficient indication that a law is not a violation of liberty in other particulars. It would be but a short and logical step from this to hold that the approval by a state legislature or by Congress of a law restricting the freedom of speech or of the press could not be considered an “abridgement” of this right within the meaning of the Constitution, and if a severe punishment should be inflicted, for violation of such a statute, the fact that a majority of the legislative body had approved the punishment might be considered as sufficient reason to hold that it was neither “cruel” nor “unusual”.

However this may be, the Supreme Court has in effect surrendered its power to declare void acts of legislature on the ground that they infringe liberty of contract. This leaves the power of the legislatures and of Congress freed (so far as due process and the Supreme Court of the United States are concerned) in the matter of the regulation of the ordinary activities of life and in that respect we are restored to the condition which existed prior to the separation from Great Britain. I express no opinion on the question whether this is advisable or otherwise, but I point out that it is not an advance but a retrogression to the status of an earlier day.

It is of course possible that if the question is presented in a different way, another view may be adopted by the Court. The law under consideration in *Nebbia v. New York* could have been sustained as a police regu-

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58. 1 BRYCE, THE AMERICAN COMMONWEALTH (3d ed. 1895) 273-274.



lation made necessary for the protection of the public safety in an emergency, or on the ground that changed conditions made it apparent that the milk business was affected with a public interest. It is possible that in some future case the Court may hold that this decision must rest upon one of the two grounds above indicated and will refuse to extend it beyond its own facts.

But whatever the future trend of decision may be, in answering the query whether constitutional protection of liberty of contract still exists, it should not be overlooked that every state legislature is governed by state constitutional provisions which may be construed by the state courts to protect liberty of contract, and state decisions striking down state statutes interfering with that liberty are not subject to review by the Supreme Court of the United States. It is only the power of Congress, therefore, which needs to be reckoned with in a state whose courts still maintain that the constitutional guarantee of liberty protects:

"the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."<sup>59</sup>

It is not my intention to enter into any discussion concerning the feeling now widely prevailing that legislative acts are necessarily beneficent in their character and should not be interfered with by decisions of the courts, but it may perhaps not be out of place to end this article with the words of Mr. Justice Brandeis, dissenting from decisions which had, however, nothing to do with the question of liberty of contract.

In *Milwaukee Publishing Co. v. Burlason*, he said:

"in every extension of governmental functions lurks a new danger to civil liberty."<sup>60</sup>

And in *Olmstead v. United States*, he issued the following warning:

"The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men . . . Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."<sup>61</sup>

59. *Allgeyer v. Louisiana*, 165 U. S. 578 (1897).

60. 255 U. S. 407, 436 (1920).

61. 277 U. S. 438, 478 (1927).